ICSI – WIRC

FOCUS

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November 2012

Dear All,

"Don't walk behind me; I may not lead. Don't walk in front of me; I may not follow. Just walk beside me and be my friend." – Albert Camus

As I write, we all are in festive mood and celebrations. I am sure this communiqué, through some more accomplishments and initiatives of ICSI-WIRC would add to your joy and happiness. ICSI-WIRC completed yet another successful month witnessing various new initiatives. Let me present some of the highlights of major developments at ICSI-WIRC since my last communiqué.

- ✓ **CSBF Cultural Evening :** I am pleased to share that ICSI-WIRC organised its first cultural evening on 3rd November, for the benefit of CSBF and I do compliment Nagpur Chapter for rising up to the occasion for this noble cause. The surplus out of the program would be contributed to ICSI CSBF, which in turn would be utilised for the benefit of CS members.

- ✓ **Release of new Publication – 'Supreme Court on SEBI Law' :** ICSI-WIRC released its another new publication, 'Supreme Court on SEBI Law'. This is first of its kind of publication and I do compliment Mr. Prakash Pandya, Chairman, Professional Research & Publications Committee, ICSI-WIRC and Ms Sailashri Bhaskar for making this unique publication a reality.

- ✓ **Students' Conference jointly with Aurangabad Chapter :** In the series of students' conferences being organised across the region, ICSI-WIRC organised another such conference jointly with Aurangabad Chapter.

- ✓ **ICSI-WIRC Investor Awareness Quarter :** I am pleased to share that we had successfully launched ICSI-WIRC Investor Awareness Quarter. As I communicate, ICSI-WIRC had already organised, jointly with MCA and BSE, twenty investor awareness programmes in various parts of Maharashtra including remote areas. I thank all those members and volunteers who are helping WIRO accomplishing this mammoth task of organising 100 such programs in a short span of 3 months, as desired by MCA.

Besides, several other initiatives are underway including some of the first of their kind of programs such as the following :

- ✓ **Inter-region sports meet :** ICSI-WIRC would be hosting the first inter-region sports meet where all the four regions across the nation would be participating.
- ✓ **State Conferences :** State Conferences in the States of Chattisgarh, Goa and Maharashtra would be organised in the month of January, 2013. Chapters of these States are gearing up for making these grand Conferences a big success.
- ✓ **All-Four Regional Councils' Joint Programs :** A series of programmes are being organised jointly by all the four regional councils, the details of which would be circulated soon.

Program	Date (Tentative)	Location
1st Inter-region Sports Meet hosted by WIRC	1st – 2nd Dec, '12	Surat
'Triveni' (Bhopal, Nagpur & Raipur) Chapters' Joint Program	7th – 8th Dec, '12	Pench Tiger Resort, Nagpur
Four Regional Councils' Joint Program hosted by NIRC	15th – 16th Dec, '12	Jalandhar & Amritsar
1st Chattisgarh State Conference	4th Jan, '13	Raipur
1st Maharashtra State Conference	5th – 6th Jan, '13	Pune
Annual Regional PCS Conference	9th – 10th Jan, '13	Vadodara
1st Goa State Conference	12th – 13th Jan, '13	Goa

I appeal all members to participate in large numbers and make these initiatives successful. Please do write at wirc.chairman@icsi.edu /cschairman.wirc@gmail.com Your suggestions and inputs would help achieve the overall objectives towards our theme of the year 2012 - *"Educate, Empower & Execute"*.

Best Wishes and Season's Greetings,

Cordially –Mahavir Lunawat
November 16, 2012

Requests...

- Become a member of ICSI Benevolent Fund (CSBF)
- Help in fund-raising initiatives of ICSI-WIRC
- Become a member of WIRC Professional Membership Scheme (PMS)

Dear Readers,

"Leadership is the ability to establish standards and manage a creative climate where people are self-motivated toward the mastery of long term constructive goals, in a participatory environment of mutual respect, compatible with personal values".

Mike Vance

Season Greeting to all.

With the elapse of time, profession of Company Secretary is getting wider and has expanded its wings to various new emerging areas like Banking, Insurance, Credit rating etc. In the National Convention at Aamby Valley, Hon'ble Vice President Mr. S. N. Ananthasubramaniam informed that talks with Indian Banking Association has reached to the advance stage and probably there will be vacancies of more than 5000 jobs in the Banking Sector for Company Secretaries in the Credit and other Departments which requires high level of responsibilities, integrity and reliability. Simultaneously, Institute is working in exploring many such opportunities which will not only create new avenues but also inspire our members to think out of the box and create more visibility in the outer world.

There seems to be a general understanding that the role of a Company Secretary is confined to secretarial and compliance jobs only – however, the current dynamic market is an ideal platform for the company secretaries to break this ice and create a space in more strategic role of the corporates.

As the company secretaries are considered to be closer to the board of a company and given the subject background they have [be it corporate laws, tax, accounting], they should help the board in drawing up strategies, planning the transactions and executing the same with a panache in light of the existing fiscal and regulatory regime and considering the proposed changes in the law – there is an urgent need among the professionals and the budding professionals to put a paddle on the gas and take themselves a notch above so that they are considered as a non disposable asset by the corporates – there is no denying fact that the value of Company Secretaryship as a profession lies in our hand and we can add to it through our hardwork, attitude and will to perform at highest level with integrity and precision.

In this edition we have covered such articles like Out of Control, External Commercial Borrowings, etc. which definitely provide a new vision to the professionals.

Happy reading!!!

CS Amit Kumar Jain

"I feel a very unusual sensation - if it is not indigestion, I think it must be gratitude." - Benjamin Disraeli

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CASE LAWS AT A GLANCE

RECENT JUDGEMENTS ON COMPANY LAW

CS Ajay Kumar, Practising Company Secretary, Mumbai

1. REGISTRATION OF CHARGES

A mere money decree passed by a Court of law does not entitle Annexure unsecured creditor to be treated as a secured creditor. To claim status of a secured creditor, either charge is to be created by parties or charge has to be created by operation of law or by decree of Court. Appellant had advanced a loan to company-in-liquidation for allotment of Non-Convertible Debentures (NCD). On company's failure to issue NCDs, appellant obtained a decree in its favour from Debt Recovery Tribunal (DRT). Official Liquidator rejected appellant's claim as secured creditor on ground that appellant's charge was not registered under section 125. A charge was created by company-in-liquidation nor a charge was created by operation of any law or by decree of DRT. Merely because appellant was in possession of a decree for recovery, did not mean that appellant became a secured creditor. Since there was no charge in favour of appellant he could not be considered as a secured creditor. **- INDUSTRIAL DEVELOPMENT BANK OF INDIA V. THAPAR AGRO MILLS LTD. [2011] 108 SCL 348/12 110 (DELHI)**

2. POWER OF, TO GRANT RELIEF

High Court will have same power to relieve an alleged offender as Criminal Court has under section 633(1). Pursuant to an inspection under section 209A of books of account and other records of company, Registrar of Companies (ROC) issued eight show-cause notices against company and its said directors, i.e., Petitioners. Show-cause notices related to alleged failure to disclose facts or information and error in accounting. Petitioners filed instant application under section 633(2) for discharging them from offences alleged in show-cause notices. According to company disclosures were properly made and it adopted and applied an accounting standards which was thought by a professionally qualified auditor to be proper. On facts, it could not be said that directors and other officers of company who were Petitioners from committed offences alleged in show-cause notices. **- DHUNSERI PETROCHEM & TEA LTD. V. ROC [2011] 108 SCL 482/12 197 (CAL)**

3. POWER OF COMPANY LAW BOARD UNDER SECTION 186

Exercising power under section 186, CLB is not required to enter upon a consideration of various allegations and counter-allegations as regards management of company. Appellants were promoters of company 'Z'. Respondent had acquired equity shares of 'Z'. Its shareholding was 46.85 per cent of equity capital of 'Z'. Appellant as well as Respondent had filed company petitions under sections 397 and 398. Both company petitions were pending before CLB. Respondent filed an application under section 186 seeking a direction for convening an extraordinary general meeting of 'Z' immediately to consider appointment of nominee directors on behalf of respondent on board of 'Z'. CLB impugned order granted permission to respondent to convene extraordinary general meeting of 'Z'. Since there were serious disputes among parties with regard to management of 'Z' and nominee directors of respondent were not there on board, CLB rightly directed convening of extraordinary general meeting in exercise of powers conferred under section 186. Since impugned direction was only for purpose of ensuring that independent directors were appointed to board of 'Z' representing majority shareholders so that company's affairs were regulated in best manner, there was absolutely no justifiable reason to find fault with such order. **– DR. JAYARAM CHIGURUPATI V. RANBAXY LABORATORIES LTD. [2011] 108 SCL 448/12 196 (AP)**

4. POWER OF COURT TO GRANT RELIEF SECTION 633(2) – ALLEGATIONS THAT ACCOUNTING STANDARDS WERE NOT COMPLIED WITH

Where most of allegations are technical in nature, relating to non-compliance of accounting standards, which have not affected the entire accounting procedure adopted by the company or in disclosure of the true affairs of the company, and the petitioners, who apprehend to be prosecuted for the alleged violations, have not only acted honestly but also have acted reasonably in maintenance of the account of the company, the petitioners are entitled to be excused under sub- section (2) of section 633 – PRADIP KUMAR KHAITAN V. R O C [2012] 106 CLA 298 (ORI.)

5. RESOLUTION OF BOARD OF DIRECTORS CANNOT BE VOIDED FOR NOT RE-DISCLOSING PERSONAL INTEREST IN A CONTRACT/ ARRANGEMENT WHEN DISCLOSURE WAS MADE IN PREVIOUS MEETING WHICH IS ON RECORD – SECTION 299

Spirit of section 299 behind disclosure of interest by a director is to put other directors and company to notice of the interest held by any of the directors in the matter under consideration. Such disclosure is necessarily of such interest or right which the other directors are not aware of. Where the directors are fully aware of the interest of directors concerned and the relevant information is already on record, the resolution cannot be voided merely for non-reiteration of the information in the format of formal disclosure which is mere empty formality – RAVI RAJ GUPTA V. HANSRAJ GUPTA 7 CO. [2011] 106 CLA 310 (DEL.)

"There is no greater difference between men than between grateful and ungrateful people." - R.H. Blyth

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CIRCULARS AND NOTIFICATIONS

CS Piyush Bindal, Practising Company Secretary, Bhopal

MINISTRY OF CORPORATE AFFAIRS

1. QUALITY OF XBRL FILINGS CERTIFIED BY PROFESSIONAL MEMBERS.

General Circular No. 33/2012

Source: www.mca.gov.in

XBRL Filing of Financial Statements by a select class of companies for FY 2010-11 was mandated vide Ministry of Corporate Affairs Notification GSR No. 748(E) dated 05.10.2011. The E-forms were duly certified by CS/CA/CWA Professionals for their completeness & correctness in their representation with respect to audited financial statement of the Company.

2. A random scrutiny of XBRL Filing of Financial Statements by a few companies for to MCA FY 2010-11 reveals significant variations in disclosures in published results & XBRL Filings due to incorrect 'mapping' of disclosures. It has been observed that few disclosures were 'mapped'/'tagged' with incorrect accounting concept despite availability of appropriate element in taxonomy. It has also been observed that provisions of 'Block Text tagging' and/or 'footnote' have been inappropriately used to report disclosures like subsidiary details, related party transactions, Director's Report, etc., even when appropriate elements were available in the taxonomy for such disclosures.
3. Such filing are inaccurate and do not adequately represent true & fair view of the state of affairs of the company as per section 211 of the Companies Act, 1956. Such XBRL filings, apart from being misleading, also dilute the effectiveness of XBRL for stakeholders' usage relating to the companies. It is unfortunate that the Professionals have certified the authenticity of such data, for which they are liable to be penalized. Such lapses defeat the very purpose of introducing XBRL filings which are meant to elicit more detailed & refined information as to the affairs of the companies. Please note that XBRL Filings are being minutely scrutinized to see if similar mistakes also appear in a larger sample.
4. It is bounden duty of Institutes to direct its members to take necessary steps to improve the quality of XBRL filings for FY 2011-12 to be undertaken by its members. The Institute may conduct further trainings, issue guidelines, etc so that such quality related issues are appropriately resolved.
5. This may be accorded high priority.

2. FILING OF BALANCE SHEET AND PROFIT AND LOSS ACCOUNT IN EXTENSIBLE BUSINESS REPORTING LANGUAGE (XBRL) MODE FOR THE FINANCIAL YEAR COMMENCING ON OR AFTER 1.4.2011.

General Circular No. 34/2012

Source: www.mca.gov.in

In continuation of the Ministry's General Circular No. 16/2012 dated 06.07.2012 on the subject cited above, it is stated that the time limit to file the financial statements in XBRL mode without any additional fee/ penalty has been extended upto 15th December, 2012 or within 30 days from the date of their AGM, whichever is later.

1. All other terms and conditions of the General Circular No. 16/2012 dated 06.07.2012 will remain the same.

3. DEFAULT BY COST AUDITORS IN FILING FORM 23D AGAINST THE CORRESPONDING FORM 23C.

General Circular No. 35/2012

Source: www.mca.gov.in

Ministry of Corporate Affairs vide General Circular No. 15/2011 dated 11.04.2011 had prescribed a revised procedure to be followed for appointment of cost auditors. As per the revised procedure, each company is required to e-file its application with the Central government in the prescribed form 23C within ninety days from the date of commencement of each financial year, which shall be approved by MCA within 30 days.

2. Upon approval by MCA, the company is required to issue formal letter of appointment to the Cost Auditor, who shall, within 30 days of receipt of such letter of appointment, inform the central government in the prescribed form 23D along with a copy of such appointment.
3. It is however observed that, since April 1, 2011, though all the appointment applications made by the Companies concerned in Form 23C have already been approved by the MCA, a large number of cost auditors have defaulted in filing the required form 23D within the stipulated time. In many cases, the default period is even more than a year. This has been viewed very seriously by the Ministry.
4. Keeping in view the initial operation of the revised procedure, all the defaulting cost auditors are requested to file the required form 23D that have already become due till date, by December 16, 2012, positively. In case of any further default, names of such defaulting members shall be sent to the institute on December 17, 2012, intimating the Institute to initiate Disciplinary proceedings against them under the relevant provisions of Cost & Work Accountants Act, 1959.
5. In cases where the company concerned, after approval of Form 23C, has failed to issue the formal letter of appointment to the Cost Auditor, they shall do so within 15 days of the issue of this circular enabling the cost auditor to file required form 23D within the extended time indicated above. In case of non-compliance, the company and every officer thereof who is found to be in default shall be punishable as per provisions of the Companies Act, 1956.
6. The Institute is requested to circulate this for the information of all concerned.

"Gratitude is an opener of locked-up blessings." - Marianne Williamson

4. APPOINTMENT OF COST AUDITOR BY COMPANIES.

General Circular No. 36/2012

Source: www.mca.gov.in

In continuation of the General Circular No. 15/2011 dated 11th April 2011, Ministry hereby makes the following changes:

(a) The company shall, within thirty days from the date of approval by MCA of the application made to the Central Government in the prescribed Form 23C seeking its prior approval for the appointment of cost auditor, issue formal letter of appointment to the cost auditor, as approved by the Board.

(b) The cost auditor shall, within thirty days of the date of formal letter of appointment issued by the company, inform the Central Government in the prescribed form 23D, along with a copy of such appointment.

(c) In case of change of cost auditor caused by the death of existing cost auditor, companies are allowed to file fresh e-form 23C, without any additional fee, within 90 days of the date of death. The additional fee payable as per the Companies (Fees on Applications) Rules, 1999 [as amended] shall become applicable after expiry of the said 90 days. Accordingly, e-forms 23C and 23D are being modified to capture such details.

(d) In case of change of cost auditor for reasons other than death of the existing cost auditor, companies are required to file fresh E-form 23C with applicable fee & additional fee, clearly specifying the reasons of change. In case of change due to resignation of the existing cost auditor, e-form 23C should be accompanied by the resignation letter of the existing cost auditor. In case of change due to the management policy of periodical rotation, then attach a copy of the Board approved rotational policy with the e-form 23C. In any other case, the change should be duly justified and supported with the relevant documents.

(e) In order to ensure compliance of section 224(1-B) of the Companies Act 1956, required changes are being made in the MCA21 system to restrict the number of cost audit approvals to the limits specified in section 224(1-B) through a counter on the membership number of the sole proprietor or partner of the firm. It will be further ensured that in case of a sole proprietor, he has completed the audit and submitted the cost audit report. In case of a partnership firm, the partner so appointed or any other partner of the same firm is allowed to complete the audit & submit cost audit report subject to his total numbers not exceeding the limit specified in section 224(1-B).

2. MCA is regularly receiving requests from the companies and cost auditors for making corrections in the e-forms 23C & 23D in respect of minor typographical errors or other mistakes such as incorrect financial year, incorrect name of the cost auditor or the cost audit firm, incorrect PAN number, incorrect scope of audit, etc. In MCA21 system, no changes are permitted in the approved e-forms. Therefore, all companies and cost auditors are hereby informed to carefully verify all particulars before uploading e-forms 23C or 23D on the MCA21 portal. In any rare case, if still any error/mistake is observed, it should be brought to the notice of MCA well before its approval enabling it to return the said e-form for re-submission after making the required corrections. Else, the companies and cost auditors shall be required to file fresh e-forms 23C & 23D containing correct particulars, along with the applicable fee and additional fee.

3. If a company or the cost auditor contravenes any provisions of this circular, the company and every officer thereof who is found to be in default, and the cost auditor in case he is in default, shall be punishable as per applicable provisions of the Companies Act, 1956.

4. The modifications contained in this circular shall be effective from the financial year commencing on or after the 1st day of January, 2013.

5. The Institute is requested to bring this to the general information of all Members in practice, and of the corporate sector.

5. EXAMINATION OF BALANCE SHEETS BY ROC's.

General Circular No. 37/2012

Source: www.mca.gov.in

It is considered expedient to issue the following circular for general information.

2. Every company registered under the provisions of the Companies Act, 1956 is required to file its Balance Sheet annually with the office of Registrar of Companies within whose jurisdiction the registered office of the Company is located. Presently, there are more than 8 lakh companies registered with various offices of the ROCs located all over the country. Balance Sheets of all the companies who carry out the filing are available for public inspection on the portal of this Ministry (http://www.mca.gov.in). The underlying idea behind the filing of Balance Sheets and other documents which require similar filings is to publicly disclose information which reflects various aspects of the working of a company so that the Company's public accountability is maintained. It is neither intended nor feasible for the Registrars to scrutinize or verify the contents of filing except on a random basis. Companies and its Directors and officials are liable to be penalized for any incorrect, false or misleading information that such filing disclose. In the following cases, however, the Registrars routinely scrutinize balance sheets:

(i) of Companies again whom there are complaints;

(ii) of Companies which have raised money from the public through public issue of shares/debentures etc.;

(iii) in cases where the auditors have qualified their reports.

(iv) Default in payment of matured deposits and debentures.

(v) References received from other regulatory authorities pointing out violations/irregularities calling for action under the Companies Act, 1956.

3. After the scrutiny steps are initiated wherever necessary to obtain explanation and clarification and to institute inspections, investigations and prosecutions wherever warranted.

"Gratitude is the music of the heart, when its chords are swept by the breeze of kindness." - Author Unknown

RESIGNATION OF DIRECTORS

CS NIDHI LADHA AND ROZY JAIN

This is a well known fact that private companies are less governed as compared to public companies and hence, chances of mismanagement are more in private companies. Generally, private companies are formed by relatives, families and such number of directors are appointed on the Board of the Directors of the companies so as to comply with the minimum requirements of the Companies Act, 1956 **(the "Act").** In most of the cases, private companies, which are family companies and have been formed on principles of quasi-partnerships, have directors representing specific groups. The absence of adequate provisions in the Act and in the charter documents of such private companies with regard to governance of companies often leads to filing of petitions under Section 397/398 of the Act i.e. Oppression and Mismanagement. One of the very common allegations in these matters is illegal removal of directors/ unauthorized removal of directors by showing false resignation letters. Hence, it becomes very important to know when does resignation takes effect in actual and what should be the form of a resignation letter.

Resignations: When Effective?

Section 284 of the Act specifies the manner in which a director can be removed from his post before expiry of his term. Further Section 283 provides certain grounds on which the office of director ceases, however, the Act does not specify any provision relating to cessation from directorship with their own wish and thus the only exit way available to a director is to tender a resignation. Since the Act does not contain any specific provision in this regard, one needs to refer to the Articles of the Association **("AoA")** of the Company. In the absence of any provision in the AoA, the terms and conditions of appointment of a Director can be seen. The Madras High Court in **T. Murari v.State of Tamilnadu**[1] held that *"In the absence of a provision in respect of resignation under the Act or under the articles of association of the company, the resignation tendered by a director or Managing Director unequivocally in writing will take effect from the time when such resignation is tendered."*

However, it is to be noted that director's resignation takes effect only when resignation is accepted by the company in the general or board meeting and not from the date of communication of same by the director, if the AoA of the Company contains specific provision in this regard. Further, the resigning director would also require to fulfil such additional conditions as may be specified in the AoA of the Company. In nutshell, as the Act does not contemplate any provision for resignation, same would be completely governed by AoA of the Company. In absence of any such provision in AoA also, ordinary and common laws shall prevail. In **S.S. Lakshmana Pillai v. Registrar of Companies**[2] the Madras High Court held as follows:

"In the absence of any provision in the articles, the ordinary rule of common law as regards resignation by an officer/agent must be followed viz., intimation by notice given either to the company or to the Board and acceptance of the same by them. Where a resignation states that it is to take effect on acceptance or the Articles so require, acceptance is necessary to end the tenure of office. Where, however, the resignations says that it is take effect immediately, acceptance is not necessary, unless the articles or any provision of law makes it necessary. Any form of resignation, whether oral or written, is sufficient, provided that the intention to resign is clear. It is however advisable that the resignation is in writing and also indicates the time when it is to take effect, so that it may serve as a record of reference in case of controversy. In the absence of any indication otherwise, a resignation takes effect immediately. Resignation will not, however, relieve him from any accountability or other liability which he may have incurred while in office."

A director resigning at a board meeting should make clear whether the resignation is with immediate effect or from the end of the meeting, as he or she is a party to the decisions of the board up until resignation.

In **S.B. Shankar v. Amman Steel Corporation**[3] the court held that where the resignation letter states that it has to take effect immediately, the date of resignation letter is taken to the date on which the director has resigned. Thus unless the AoA of the Company concerned contain any specific provision about the acceptance of resignation by the Board of Directors of the company, the resignation from directorship takes effect immediately i.e., from the date of the resignation letter.

[1](1976) 46 Com. Cases, 613 (Mad)
[2](1977) 47 Com. Cases 652
[3](2002) 51 CLA 341

"Gratitude is an art of painting an adversity into a lovely picture." - Kak Sri

Notice Period for Tendering Resignation

As mentioned above, the resignation terms are governed by the AoA and/or the terms of appointment of a director. If the AoA or the terms of appointment requires a notice period to be fulfilled, the resignation can take effect only after meeting such requirement of notice period. However, if there is no specific provision in the AoA, a director can resign without giving a reasonable notice as held in the case of **OBC Caspian Ltd v Thorp**[4].

It is to be noted that in case of voluntary resignation of a permanent director when permitted under the AoA, is not dependent upon its acceptance by the company. The permanent director is entitled to relinquish his office as held in **Fateh Chand Kad v. Hindsons (Patiala) Ltd**[5].

Form and Content of Resignation Letters

A resignation letter should be addressed to the company or the Board of Directors of the Company. If addressed to a third

party, such resignations are not acceptable by the Company . It is to be noted that any form of resignation should specify the intention to resign clearly and the date from which such resignation will take effect, any form of resignation will surely not relieve a director from any accountable or any other liabilities.

Oral Resignations: How Much Effective?

Oral resignation at a board meeting will be effective if that resignation and its effective timing are clear and unambiguous and the resignation is accepted by the other directors present, but it is wise to follow up an oral resignation with written confirmation to the company chairman or to the company secretary or as required by the articles.

An oral resignation given by the resigning director in the general meeting and on acceptance of same by the members, it can be effective and valid even if the AoA of the Company requires a written notice as held in **Glossop v. Glossop**[7], This international view has also been affirmed in India in **State v. Sitaram**[8] by the Patna High Court and by Delhi High Court in **Mohan Chandra v. Institute of Chartered Accountant**[9].

Effect of Filling of Necessary Forms with Concerned Registrar of Companies (RoC)

Section 302(2) of the Act casts a legal obligation on the company to inform the registrar of the companies by filling Form 32 giving particulars of changes, if any, in the office of director. If such a form is filed with the registrar of companies it is a proof of a director ceasing to be a director but, it is not an act to be complied with in order to make resignation valid. Resignations once made, take effect immediately and the concerned RoC is informed formally in terms of provisions of the Act. However, mere non filing of requisite form with the concerned RoC does not invalidate the resignation of a director. The Bombay High Court in **Dushyant D Anjaria V. Wall Street Finance Ltd**[10] held that

"…..The resignation of a Director would be effective from the date it was submitted, for the reason that the letter brings out clearly the intention of the person to resign. So far as the formalities like filing up Form 32 and sending it to the Registrar of Companies were concerned, it was for the company to comply with them in conformity with the provisions of Sec. 302 or Sec. 303 of the Companies Act. Where there was delay or negligence on the part of the company in intimating the Registrar about the date of resignation, the Director who had resigned could not be saddled with responsibility and liability for such delay…."

Liability of Resigning Directors

Section 5 of the Act defines "Officer in Default" mentioning a list of officers who will be prosecuted for any violation or offence under the Act. The list includes 'directors' also. It is pertinent to note that for the purpose of the said section, the default in reference to an officer means the default during his tenure. In other words, if a default is committed when a person was not even an 'officer in default', he cannot be prosecuted and held liable for such default. In the similar way, if it is proved that a director at the time of the contravention was in-charge of and responsible to the company for the conduct of its business, he will be held liable even if resigns afterwards.

Concluding above, a director who has resigned would not be liable for anything that happens subsequently. However, he can still be held liable for any mischief or offence made during his directorship.

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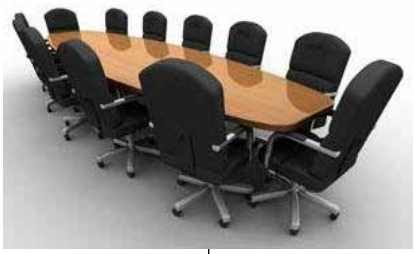
[4] *(1998) S.L.T. 653 (Scot)*
[5] *(1957) 27 Com Cases 340*
[6] *Registrar of Companies v. Orissa Paper Products Ltd., (1988) 63 Comp cases 460 (Ori)*
[7] *(1907) 2 Ch 370*
[8] *AIR 1967 Pat 433*
[9] *AIR 1972 Del 91*
[10] *(2001) Comp. Cas. 655 (Bom)*
[11] *(2003) 53 CLA 265*

"If you have lived, take thankfully the past." - John Dryden

In case of **Pandurang Camotim Sancolarcar V. Suresh Prabhakar Prabhu**[11] it was held that when the articles of association provided that the resignation would be effective from the date it was tendered and when the respondent had raised a defence that he resigned on 6.5.1996, the fact of his resignation was not in dispute, what was in dispute was only the date of resignation. Clearly it was a case where the respondent had resigned on 6.5.1996 and ceased to have any connection with the company. It was held that he was not in charge of the management of the day to day affairs of the company subsequent to his resignation.

The Kerala High Court while dealing with a prosecution case against a Managing Director in **Achutha Pai V. Registrar of Companies**[12], put additional restriction on resignation of managing directors. In this case, the Managing Director who was prosecuted for default under Section 220 of the Companies Act, 1956 contended that he was not liable as he had resigned before the last date for filing accounts. The court held that a Managing Director combines two capacities, namely, manager and director. Hence, resignation of a managing director becomes effective only when the company accepts the resignation and relieves him from his duties as manager as well.



Resignations by Nominee Directors

It is quite common to appoint nominee directors on a Board of Directors of a Company by lenders. Sometimes, nominee directors are also appointed by another company as its representative pursuant to Shareholders' Agreement or Joint Venture Agreements. The general law pertaining to resignations is that a resignation is effective once it is tendered. However, the nominee directors so appointed by a nominator owe some duties towards the appointing authority and cannot resign from the directorship without consent of the appointing authority. Any appointment or removal of such nominee directors are governed by AoA of the agreement as entered into with the Company. Where nomination is done by an appointing authority, the resignation should be served to the appointing authority and not to the Company. Since the nominees have been nominated by such authority only, they acquire the position of agent of the appointing authority and such agency can be terminated only by service to the principal. Once consented by the appointing authority, the nominee director may intimate company also.

Cases with Forged Resignation Letters

As mentioned above, now-a-days, many cases have seen where forged and fabricated resignation letters have been used to show the illegal removal of directors. These cases are quite common in private companies which are lesser regulated and are quasi partnership kind of companies. Forged signatures are used to oust a group/person from the management of a company. Such practice of using forged resignation letters ultimately leads to taking actions before Company Law Boards (CLB) and other appropriate authorities. Thousands of cases under section 397/398 of the Act are pending with CLBs. Such actions in all cases have been proved to be time consuming and puts heavy cost burden on parties to such dispute. The records available in public domain i.e. records available with the Ministry are updated as soon as any form is filed. So, immediately on approval of a Form 32 filed for removal of directors, the name of the removed director, even if removed illegally with the fabricated signature, will disappear from the records of the company.

Presently, RoC approves all forms intimating the resignations of directors without giving any chance of hearing to the removed director. As like in transfers, obtaining consent of transferor has been made mandatory before registering any transfers, such system and procedure also needs to be put in place so that the removed director gets a chance to put his stand. The Ministry should formulate the process under which the removed director is intimated before removal. Though, with the time, Ministry's efforts in this respect are commendable as intimation of any removal is intimated to directors vide email, however, yet not sufficient. System should be such so as to provide a prior intimation to the directors before approval of any such form in order to enable them to take necessary action within time.

Conclusion

From the several judicial pronouncements, some of which have been quoted in this write-up, we may conclude that:

1. Resignations are governed by AoA of a Company and if no such provisions are there in the AoA, resignations will be in accordance with the common laws.
2. Resignations are effective only after acceptance of same by the Company in board or general meeting as the case may be. However, resignations may take effect immediately after tendering if so provided by the AoA of the concerned company.
3. Non filing of requisite form with the concerned RoC does not invalidate the resignations.
4. Persons cannot be held liable for any breach or default by the Company subsequent to their resignations from the post of directorships. However, they may be held liable for any default made during their tenure of directorship.

(1966) 36 Com. Cases 598 (Ker)

"As each day comes to us refreshed and anew, so does my gratitude renew itself daily. The breaking of the sun over the horizon is my grateful heart dawning upon a blessed world." - Terri Guillemets

OUT OF CONTROL?

CS Gaurav Pingle

Brief Summary: The term "Control" is one of crucial and a very strategic term in the Corporate Sector. It has been very widely defined in various corporate laws and also there are many case laws to further elaborate or clarify its definition. Here is an analysis of the definitions and to understand that whether the definition or the concept of "Control" has actually gone out of control?

In day to day working and also in strategic planning, a Professional comes across the term and concept of "Control". Few of the instances are the appointment of a Director in a Company, drafting the Articles of Association, drafting of Joint Venture Agreements, drafting of the Shareholders Agreement, finalizing Financial Policies, a listed company acquiring shares of other companies (listed or unlisted), Reporting and Disclosures requirements of the Accounting Standards and implications under the Income Tax Act.

The term is very widely defined in the Corporate Laws. Sometimes, we, as Professionals happen to think that whether the definition or the concept of "Control" has gone out of Control? Why is it so difficult to quantify / define "Control" Or Why can't we have one definition for the concept?

In this Article, I have analyzed the definition of "Control" by referring the Dictionary and corporate laws (existing and proposed):

(I) Blacks Law Dictionary:

(1) Control (as Noun) - The direct or indirect power to direct the management and policies of a person or entity, whether through ownership of voting securities, by contract, or otherwise; the power or authority to manage, direct or oversee.

(2) Control (as Verb) - To exercise power or influence over.

(II) The Companies Act, 1956:

Section 4 of the Companies Act, 1956 relates to the "Meaning of Holding Company and Subsidiary".

As per Section 4 of this Act, the companies ("S1 & S2") will be subsidiaries of company ("H") if:

a) H controls the composition Board of directors of S1 / S2 or;

b) H holds more than half of the nominal value of its equity share capital of S1 / S2 or

c) S2 is a Subsidiary of S1 and S1 is a subsidiary of H.

In Section 4 (2) of this Act, the term "control over the composition of the Board of Directors" has been further elaborated as H may on its own discretion and without the consent of any other person, can appoint or remove all or a majority of the directors in S1/S2.

(III) SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011:

In these Regulations, "Control" is defined in Regulation 2 (1) (e) and it includes:

1) The right to appoint majority of the directors or,

2) The right to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner:

This definition in SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 is subject to the proviso that a director or officer of a Target Company shall not be considered to be in control over such target company, merely by virtue of holding such position –i.e. the position of the Director.

Therefore, in these Regulations, the emphasis on more on the right to appoint directors and right to control the management / policy decisions of the company.

(IV) Accounting Standard (AS) – 18 Related Party Disclosures:

"Control" is defined in Clause 10 of AS – 18. The emphasis is on:

a) Ownership of voting power or

b) Control over composition of Board or

c) Directing the management / policy decisions through substantial interest in the voting power of a company.

"I would maintain that thanks are the highest form of thought; and that gratitude is happiness doubled by wonder." - G.K. Chesterton

(V) Consolidated Financial Statements (AS – 21) & Accounting for Investments in Associates in Consolidated Financial Statements (AS – 23):

"Control" is defined in Clause 5 of AS – 21 and in Clause 3 of AS – 23. In both the cases, it includes:

a) Ownership of more than half of the voting power of an enterprise or;

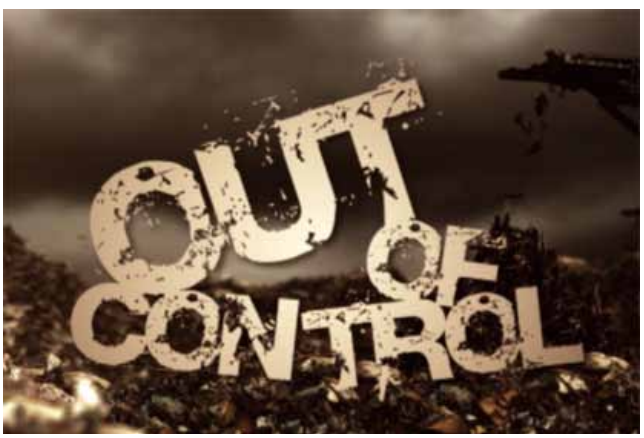
b) Control over the composition of the Board of Directors / Governing body with an intention to obtain economic benefits from its activities.

(VI) Financial Reporting of Interests in Joint Ventures (AS – 27):

As AS – 27 relates to Financial Reporting of Interests in Joint Ventures, the Clause 3 of the AS has defined both "Joint Control" and "Control".

"Joint Control" is the contractually agreed sharing of control over an economic activity. "Control" is the power to govern the financial and operating policies of an economic activity so as to obtain benefits from it.

Now, the AS – 27 does not specifically have any provision relating to holding of voting power and control over the composition of the Board of a Company.



(VII) The Companies Bill, 2011:-

It shall include:

a) Right to appoint majority of the Directors or

b) Right to control the management or policy decisions exercisable by a person (individually or in concert), directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner.

The definition is as per Clause 2 (27) of the Bill. If, we observe keenly, the definition of "Control" in the Companies Bill, 2011 very similar to the definition of "Control" under SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.

(VIII) The Income Tax Act, 1961:

In Income Tax Act, 1961 – the term "Control" / "Substantial Interest" / has been defined in various sections and the same is elaborated as under:

1) Section 40A relates to "Expenses or payments not deductible in certain circumstances".

The concept of "substantial interest" for the purpose of Section 40A (2b) is given in the Explanation to the Section which states that a person shall be deemed to have a substantial interest (in case of business or profession), if he, at any time during the Previous Year, is the beneficial owner of shares carrying not less than 20% of the voting power.

2) Section 92A of the Income Tax Act, 1961 relates to "Meaning of Associated Enterprise". The "Associated Enterprise", in relation to another Enterprise, means an Enterprise:

(a) Which participates in the management or control or capital of the other enterprise; (here the relation is between two enterprises) or

(b) In respect of which one or more persons who participate in its management or control or capital, are the same persons who participate in the management or control or capital of the other enterprise (here there is a relation between two enterprises through one or more person).

Such participation can directly or indirectly, or through one or more intermediaries.

There are 13 Tests in the Section (and any one can be applied), to determine, if two enterprises shall be deemed to be Associated Enterprises ("Alpha" and "Beta" mentioned wherever necessary). Some of them are listed as under:

(a) Holding of not less than 26% of the Voting Power (directly or indirectly);

(b) Loan advanced by Alpha to Beta constitutes not less than 51% of Book Value of the Total Assets of Beta;

(c) Alpha guarantees not less than 10% of the Total Borrowings of Beta;

(d) Beta appoints more than half of the Board of Directors / Members of the Governing Board of Alpha or

(e) Same person appoints more than half of the directors / Members of Governing Board of each of Alpha and Beta

(f) Alpha is wholly dependent on the Intellectual Property (IP) of Beta for its manufacturing or processing activity ; or

(g) Beta supplies 90% or more of the raw materials

"You say grace before meals. All right. But I say grace before the concert and the opera, and grace before the play and pantomime, and grace before I open a book, and grace before sketching, painting, swimming, fencing, boxing, walking, playing, dancing and grace before I dip the pen in the ink." - G.K. Chesterton

and consumables required for the manufacture or processing carried out by Alpha; or

(h) Alpha manufactures and processed goods / articles and sells to Beta and prices & conditions are influenced by Beta or

(i) There exists between Alpha and Beta, any relationship of mutual interest, as may be prescribed.

The relationship defined in Section 92A of the Income Tax Act, 1956 is the widest of all (in my view) because it not only considers voting rights and power to appoint Directors; but also covers Control through granting of loan, guarantee of loan, dependency on IP for manufacturing; supply of raw material, control over prices and finalization of terms and conditions.

Really out of Control? :

As seen above, there are many definitions of "Control" in the various legislations and only few are discussed above. So, has the definition of "Control" become out of Control and not manageable? Why can't the all the laws in a country have the one single definition for a legal concept?

The reason, in my view, is that every legislation has its own objective and principles. Broadly speaking, the objective of Company Law is to manage and administer the working of the Companies in India, whereas the objective of Taxation Laws is to ensure the tax is not evaded by the Companies through complicated transactions and the objective of Accounting is to ensure that the Financial Statements give a true and fair view of the state of affairs of the company and also ensure adequate discl requirements. Hence, accordingly the definition is drafted in a particular legislation to meet its objectives.

Further, the common thread / theme in the above definitions of "Control" is:

(1) Control over the composition of the Board of Directors / Right to appoint Directors;

(2) Ownership of Voting Rights;

(3) Control and Management over the Policies decisions / Management decisions;

Now, the quantum of such theme and the manner of exercising control or influence will depend upon the respective Legislations and its objective.

Here, the "Quantum" means the percentage of the voting rights held and manner of exercising control or influence can be, direct or indirect; individually or in concert; by any agreement, etc.

CONCLUSION:

At the time of decision making, a Professional is required to take comprehensive and complete view of all the applicable laws from the point of view of change in "Control". Having only one and a limited perspective of the law would not assist the management of the Company in taking informed decisions.

Acknowledgement: Special Thanks to C.A. Gaurav Jangale for his valuable contribution.

Source of information: Black's Law Dictionary (8th Edition), The Companies Act, 1956, www.sebi.gov.in, www.icai.org, www.mca.gov.in, www.incometaxindia.gov.in.

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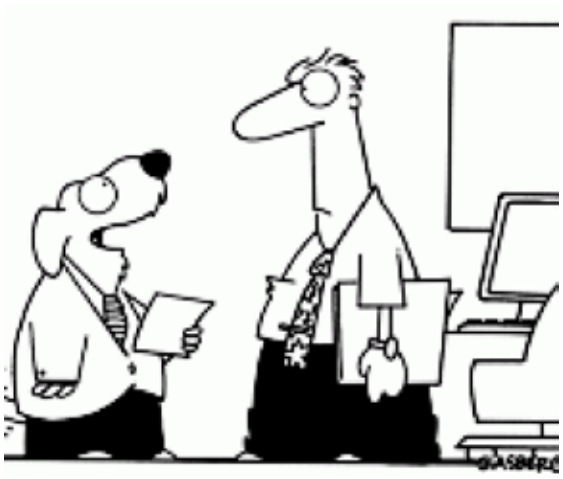

"I Just got promoted again.
It's easy to succeed if everyone likes you!"

Smile Please

Committee: a group of men who individually can do nothing but as a group decide that nothing can be done.

"For each new morning with its light, For rest and shelter of the night, For health and food, for love and friends, For everything Thy goodness sends." - Ralph Waldo Emerson

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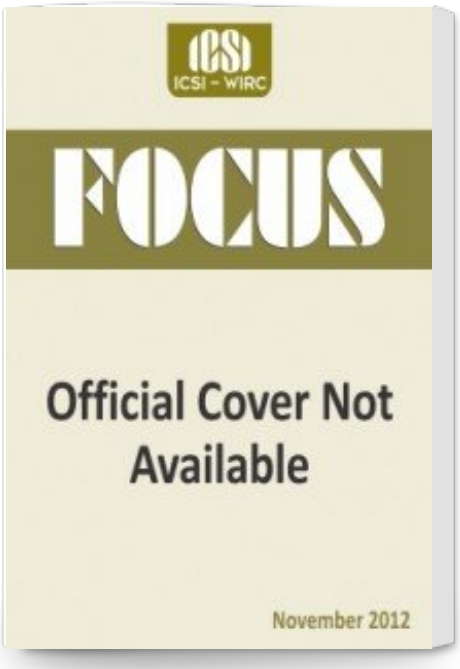

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